***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

610

Brief for Appellant

UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 22,867, 22,895

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UNITED STATES OF America

Appellee

v.

Darnell R. BRADFORD

Appellant

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Appeal from a Judgment of the United States District Court for the District of Columbia

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Brief for Appellant

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Appeal from a Judgment of the United States
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## ISSUES PRESENTED FOR REVIEW

The issues presented for review in this case are:

1. Whether the interrogation of defendant by the Deputy Clerk, at the time defendant pleaded guilty, failed properly to reveal whether appellant truly understood the nature of the charges to which he was pleading.

2. Whether the District Judge erred in delegating to the Deputy Clerk the responsibility of interrogating defendant at the time he made his guilty pleas, rather than handling such interrogation personally.

3. If the questions above are answered in the affirmative, whether this Court should set aside the judgments in these cases and permit defendant to plead anew to the indictments.

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This case has not previously been before the Court, under the same or any other title.

## REFERENCES TO RULINGS

This appeal is from a judgment entered on a plea of guilty, without an adequate and proper inquiry as to whether the defendant understood the nature of the charges to which he was pleading. The basis for the judgment was the plea of guilty. This appears in the judgments and commitments, dated January 17, 1969, both in Criminal No. 1131-66 and in Criminal No. 1395-68.

## STATEMENT OF THE CASE

Darnell R. Bradford, the appellant herein and the defendant below, pleaded guilty in the District Court to two separate counts of robbery under two separate indictments, and was sentenced in each case to a four to twelve year term of imprisonment, the sentences to run consecutively. In each case, he filed timely pro se motions for leave to appeal in forma pauperis, which were granted by the District Court. The undersigned attorneys were appointed by this Court to represent defendant in his respective appeals. After reviewing the cases, both counsel concluded that the appeals raised identical issues, and therefore elected to file this single consolidated brief. A motion to consolidate these cases for purposes of brief and argument was granted by the Court on July 30, 1969.

## The Indictments

For convenience, the indictments in these cases will be referred to by their docket numbers in the District Court, 1131-68 and 1395-68. The indictment in number 1131-68 contained a total of thirteen counts, charging defendant and two co-defendants with armed robbery, simple robbery, assault with a dangerous weapon, carrying a dangerous weapon, and possession of a prohibited weapon. The indictment in number 1395-68 contained a total of eight counts, charging defendant with entering a Federal Credit Union with intent to commit robbery, taking money belonging to and in the custody and control of the Federal Credit Union, robbery, and assault with a dangerous weapon.

## The Guilty Pleas

Upon his original arraignment in each case, defendant entered pleas of not guilty. However, on November 4, 1968, he appeared before Judge June Green, along with his appointed counsel, Mr. Charles Vizzini, and an Assistant United States Attorney, Mr. James Kelley, at which time Mr. Kelley announced to the Court that defendant was going to plead guilty to count two in number 1131-68 and to count

three in number 1395-68. Both of these counts charged defendant with simple robbery.[1]

Defendant was then interrogated by the Deputy Clerk, as follows:

THE DEPUTY CLERK: Are you Darnell R. Bradford?

THE DEFENDANT: Yes, I am.

THE DEPUTY CLERK: Darnell R. Bradford, have you been advised and do you understand that you have a right to a speedy trial by jury with the aid of counsel?

THE DEFENDANT: Yes, ma'am.

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[1] Count two of number 1131-68 alleged:

> "On or about May 24, 1968, within the District of Columbia, Darnell R. Bradford, Paul E. Hawes and John H. Anderson, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of James E. Ritchie, property of Versis Food Distributors, Inc., a body corporate, of the value of about $1,294.00 in money."

Count three of number 1395-68 alleged:

> "On or about January 17, 1968, within the District of Columbia, Darnell R. Bradford, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Elizabeth A. Walker, property of the Central Cardozo Federal Credit Union, a body corporate, of the value of about $489.00, consisting of $489.00 in money."

THE DEPUTY CLERK: Do you understand that you will have no such right if your plea of guilty is accepted in each case?

THE DEFENDANT: Yes, ma'am.

THE DEPUTY CLERK: Do you understand that you will have the assistance of counsel at the time of sentencing if your pleas this morning are accepted?

THE DEFENDANT: Yes. I do.

THE DEPUTY CLERK: Do you understand that you are pleading guilty to Count 2 of Criminal case number 1131-68 in which you are charged with robbery?

THE DEFENDANT: Yes, I do.

THE DEPUTY CLERK: And, do you understand that you are pleading guilty to Count 2 of Criminal case 1395-68, in which you are charged with robbery?

MR. KELLEY: Excuse me. Count 3.

THE DEPUTY CLERK: Count 3?

MR. KELLEY: Yes.

THE DEPUTY CLERK: Do you understand that you are pleading guilty to Count three of the indictment in which you are charged with robbery in Criminal case 1395-68?

THE DEFENDANT: Yes, ma'am.

THE DEPUTY CLERK: And, did you commit these crimes?

THE DEFENDANT: Yes, I did.

THE COURT: Are you pleading guilty because you actually did commit the robbery?

THE DEFENDANT: Yes.

THE COURT: In both instances?

THE DEFENDANT: Yes.

THE COURT: All right.

THE DEPUTY CLERK: Has your plea of guilty in each case been induced by any promises by anyone as to what sentence will be imposed by the Court?

THE DEFENDANT: No, ma'am.

THE DEPUTY CLERK: Have you been threatened or coerced by anyone into entering a plea of guilty?

THE DEFENDANT: No, ma'am.

THE DEPUTY CLERK: Have any promises of any kind been made to you by anyone to induce a plea of guilty in these indictments?

THE DEFENDANT: No, ma'am.

THE DEPUTY CLERK: Have you been advised as to the maximum sentence that may be imposed?

THE COURT: Do you know that it would be not less than two nor more than fifteen years on each of the two counts, and it could be consecutive. It could be concurrent.

THE DEFENDANT: Yes.

MR. VIZZINI: I so advised him many times, your Honor.

THE DEPUTY CLERK: Do you understand the consequences of entering a plea of guilty?

THE DEFENDANT: Yes.

THE DEPUTY CLERK: Are you entering a plea of guilty voluntarily and of your own free will?

. . . .

THE DEFENDANT: Yes, ma'am.

THE DEPUTY CLERK: Because you are guilty and for no other reason?

THE DEFENDANT: Yes.

THE DEPUTY CLERK: Have you discussed your plea fully with your attorney?

THE DEFENDANT: Yes.

THE DEPUTY CLERK: Are you completely satisfied with the services of your attorney?

THE DEFENDANT: Yes.

THE DEPUTY CLERK: Darnell K. Bradford, in Criminal Case Number 1131-68, do you wish to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to count 2 of the indictment in which you are charged with robbery?

THE DEFENDANT: Yes.

THE DEPUTY CLERK: Darnell K. Bradford, in Criminal case Number 1395-68, do you wish to withdraw your plea of not guilty heretofore entered, and enter a plea of guilty to count 3 of the indictment in which you are charged with robbery?

THE DEFENDANT: Yes.

The colloquy set forth above constitutes the court's entire interrogation of defendant; no questions asked or answers given have been omitted. At the conclusion of this colloquy, the court remanded the defendant to jail to await sentencing, and Mr. Kelley advised the Court that the government would dismiss the remaining counts in both indictments.

On January 17, 1969, defendant was brought before Judge Green for sentencing. No further inquiry was made at that time to determine whether his plea was voluntary, or whether he understood the nature of the charges to which he had pleaded guilty. The court imposed two consecutive sentences of four to twelve years each, and the government then dismissed the remaining counts to both indictments. These appeals followed, and the District Court allowed defendant to proceed on appeal in forma pauperis. Counsel for defendant was appointed by this Court.

## ARGUMENT

### I

### THE INTERROGATION OF DEFENDANT AT THE TIME HE MADE HIS PLEA OF GUILTY FAILED TO REVEAL THAT HE UNDERSTOOD THE NATURE OF THE CHARGES TO WHICH HE WAS PLEADING.

(In connection with this point, defendant desires the Court to read the two indictments, the six-page transcript of plea, the three-page transcript of sentencing and the two judgments.)

Rule 11 of the Federal Rules of Criminal Procedure provides that the court "shall not accept" a plea of guilty "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea" (emphasis added). In the present case, the questions which were asked of defendant and the answers which he gave simply did not show that he understood the charges against him. This error requires

that the judgments of conviction should be set aside, and that defendant should be permitted to plead anew to the indictments. At the very least, the case must be remanded for a hearing to determine whether defendant did in fact understand the nature of the charges against him.

Set forth above (pp. 3-5) is the entire colloquy which took place between the Deputy Clerk and defendant at the time he changed his plea to guilty. The only questions asked of defendant at that time which even remotely related to his understanding of the charges to which he was pleading were the following:

> "Do you understand that you are pleading guilty to Count 2 of Criminal case number 1131-68 in which you are charged with robbery?"
>
> "Do you understand that you are pleading guilty to Count three of the indictment in which you are charged with robbery in Criminal case 1395-68?"

These questions are plainly insufficient to meet the requirements of Rule 11. Defendant's affirmative answers to these questions reveal only that he was aware that he was pleading guilty to "robbery," but they do not reveal whether he understood what that word means - i.e., what acts would constitute robbery as defined by the law.

The term "robbery" has a very specific legal meaning, which differs markedly from the layman's understanding of the term. In common parlance, the term robbery is used interchangeably with theft

and stealing. The crime of robbery, however, includes only one specific type of theft, namely a taking "from the person or immediate actual possession of another" by "force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear." D.C. Code 22-2901 (1967).

The courts have uniformly held that a plea of guilty cannot be accepted unless the defendant understands "(1) the meaning of the charge, (2) what acts are necessary to establish guilt." Munich v. United States, 337 F.2d 356, 359 (9th Cir. 1964) (emphasis added). "Even when the defendant is represented by counsel it has been held that the mere statement of the accused that he understands the charge against him does not relieve the court of the responsibility of further inquiry." United States v. Lester, 247 F.2d 496, 500 (2d Cir. 1957). See also United States v. Davis, 212 F.2d 264 (7th Cir. 1954).

In this jurisdiction, the procedures to be followed when a defendant makes a guilty plea are prescribed by a Resolution of the District Judges which was first adopted in 1959, and amended in 1961. In June 1969, which was after the sentencing of this defendant, the procedures were amended again, presumably in response to the Supreme Court's decision in McCarthy v. United States, 394 U.S. 459 (1969), which is discussed below. The version in effect at the time defendant was sentenced provided that among the facts to be determined by the court through interrogation of the defendant were the following:

> "3. That defendant understands the nature of the charges against him which should be stated to him in brief by the Court notwithstanding a prior reading of the indictment.
>
> "4. That defendant did in fact commit the particular acts which constitute the elements of the crime or crime charged."

In light of this long-standing rule, it is difficult to understand the failure of the court to follow the prescribed procedures in this case.

The Supreme Court, in the above-mentioned McCarthy decision, has underscored the crucial importance of a judicial determination of the defendant's full understanding of the charge against him before his plea of guilty may be accepted. McCarthy v. United States, 394 U.S. 459 (1969).[2/] In that case, the Court held that when a district judge fails to determine through direct interrogation of the defendant that he fully understood the nature of the charge, the plea of guilty must be set aside and the defendant permitted to plead anew. The Court pointed out that "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 394 U.S. at 466 (emphasis added).

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2/ See also Boykin v. Alabama, 395 U.S. 238 (1969), holding that the requirement that the record disclose the defendant's understanding of the charges to which he pleads guilty is of constitutional dimension.

The Court in McCarthy rejected the contention that a guilty plea which had been accepted without full compliance with Rule 11 should be set aside only if it is determined, either from the record or upon a new hearing, that in fact the plea was not made voluntarily or that the defendant lacked a full understanding of the charge. The whole purpose of the Rule, the Court said, was to avoid this type of after-the-fact determination. Thus, the Court held that "a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew." 394 U.S. at 472.

Shortly after McCarthy was decided, the Court, in Halliday v. United States, 394 U.S. 831 (1969), held that the remedial aspect of McCarthy, i.e., the holding that any guilty plea accepted without full compliance with Rule 11 must be automatically set aside, would be applied only prospectively to pleas accepted after April 2, 1969, the date of the McCarthy decision. The plea in the present case, of course, was entered prior to that date. Nevertheless, we submit that this Court, in the exercise of its supervisory power over the District of Columbia courts, should apply the McCarthy rule in the present case.

The Supreme Court's decision in Halliday was prompted in large part by the fact that most of the federal courts had not previously held that it was essential for the court to interrogate the defendant as to the voluntariness of his action, and his understanding of the charge, before accepting a guilty plea. The Court was thus concerned that

retroactive application of McCarthy would result in the setting aside of a large number of guilty pleas, even in cases in which the defendant did in fact plead voluntarily and with full knowledge of what he was doing. In the District of Columbia, however, no such danger exists. As demonstrated above, the District Court has long had a rule requiring full interrogation of the defendant to determine, inter alia, his understanding of the charge. There is therefore no reason not to apply the McCarthy rule in the present case.

If the Court should conclude, however, that the McCarthy remedy should not be applied here, then the appropriate disposition would be to remand the case to the District Court for a hearing as to whether defendant in fact understood the nature of the charges to which he pleaded at the time he made his plea. See McCarthy v. United States, 394 U.S. at 469. At such a hearing, the burden of proof would be on the government. Rimanich v. United States, 357 F.2d 537, 538 (5th Cir. 1966), and cases cited therein. Even before McCarthy, there was never any dispute that if a guilty plea has been accepted without full compliance with Rule 11, the government must prove - either from the existing record or at a new hearing - that the defendant did act voluntarily and with full understanding of the charge to which he pleaded. The government conceded this much in its brief in the McCarthy case (pp. 20-23). In the present cases, there is nothing whatever in the record to indicate that appellant understood the charges against him. Thus, at the very least, there must be a hearing on this question.

If the Court decides to remand these cases for such a hearing, it should direct that the hearing be before some judge other than the one who accepted defendant's plea. With all respect to Judge Green, it would obviously be difficult for her to be fully objective in a situation in which she would, in effect, be reviewing the correctness of her prior decision to accept defendant's plea. This precise question was raised in an earlier stage of the Halliday case, and the First Circuit came to the same conclusion urged here:

> "It seems to us that hearings on factual issues occasioned by an initial failure to comply with Rule 11 combine whatever ordinary hazards lie in self-review of factual determinations with the danger of improperly interjecting personal recollections of matters outside the record. Were it possible to identify in advance those cases where such a combination of factors would be likely to be present, we might limit our holding to them, but we are persuaded that such a limitation would not be feasible. In saying this we would not be thought to disparage the capacity for objectivity of district judges; rather, we feel that they should be relieved of what we deem the unnecessary burden of deciding when they can properly redetermine factual issues in this particular area. Moreover, it is not unimportant that judicial decision-making not only be fair, but that it so appear to all eyes." Halliday v. United States, 380 F.2d 270, 274 (1st Cir. 1967).

THE DISTRICT COURT ERRED IN DELEGATING TO THE DEPUTY CLERK THE RESPONSIBILITY OF INTERROGATING DEFENDANT AT THE TIME HE MADE HIS PLEA OF GUILTY
(In connection with this point, defendant desires the Court to read the trascript of plea.)

When Rule 11 was amended in 1966, language was added which prohibits the court from accepting a plea of guilty "without first addressing the defendant personally" to ascertain that the plea is made voluntarily, with understanding of the nature of the charge. The clear intent of this rule change was to require the judge, not counsel or the clerk, to conduct the interrogation of the defendant:

> "Prior to the 1966 amendment . . . not all district judges personally interrogated defendants before accepting their guilty pleas. With an awareness of the confusion over the Rule's requirements in this respect, the draftsmen amended it to add a provision 'expressly requiring the court to address the defendant personally.' This clarification of the judge's responsibilities quite obviously furthers both of the Rule's purposes. By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack." McCarthy v. United States, 394 U.S. at 465-66.

In the present case, defendant was interrogated by the Deputy Clerk, with only an occasional interjection by the Judge. Aside from the fact that this procedure violated the plain language of the Rule, it is

simply an inadequate means for determining whether the defendant is truly acting voluntarily, with full understanding of what he is doing. When a clerk routinely reads a set of prepared questions, there is a serious danger that the defendant will answer them automatically, without full understanding of their meaning or their importance. Moreover, the determination required by Rule 11 cannot be adequately made through questions which are written out in advance and not tailored to the particular defendant and the particular case. The type of language used should be varied, depending upon the intelligence and education of the defendant. And the questions should be phrased in terms of the particular facts of the case and the particular allegations of the indictment. This is a judicial, not a clerical, function, and the Rule so states. Only by incorporating specific names, dates, and events in the questions asked of the defendant can the Court truly ascertain that the defendant is in fact guilty, and that he knows he is guilty. The kind of questioning which was conducted in this case was designed simply to "make a record," and not truly to probe the defendant's mind.

The failure of the District Judge to personally interrogate the defendant is in itself a sufficient ground for setting the case aside and permitting him to plead anew. Only by this means can this Court impress upon the District Court the importance of the requirements set forth in Rule 11.

## CONCLUSION

For the reasons stated, the judgments in these cases should be vacated and the case should be remanded with instructions to permit the defendant to plead anew to the indictments. In the alternative, if the Court is unwilling to set aside the guilty pleas on this record, the case should be remanded with instructions to the District Court to vacate the judgments unless the government can prove, at a hearing before another judge, that appellant fully understood the charges against him at the time he entered his guilty pleas.

Respectfully submitted,

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# APPELLANT'S REPLY BRIEF



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# APPELLANT'S REPLY BRIEF

The Government's brief does not dispute the fact that the questions put to the defendant at the time he made his guilty pleas, and the answers he gave, failed to reveal whether the pleas were made "voluntarily with understanding of the nature of the charge" as required by Rule 11. The Government claims, however, that this was not reversible error. We shall respond briefly to the Government's main contentions.

## I.

The Government argues that the holding of McCarthy v. United States, 394 U.S. 459 (1969) is inapplicable to this case, because the Court ruled in Halliday v. United States, 394 U.S. 831 (1969) that McCarthy would not be

applied retroactively. Therefore, the Government argues, "Halliday should be dispositive of the instant case."

The fallacy of this argument is that the Halliday holding concerning non-retroactivity applies only to the remedial aspect of McCarthy -- i.e., the ruling that a guilty plea which has been accepted without full adherence to Rule 11 must automatically be set aside. The fact that this rule is not to be applied retroactively does not mean that a defendant whose guilty plea was accepted prior to McCarthy without compliance with Rule 11 is entitled to no remedy at all. On the contrary, even under pre-McCarthy law, such a defendant is at least entitled to a judicial determination whether his guilty plea was made voluntarily and with full understanding of the charge to which he was pleading. If that determination cannot be made on the basis of the record, as is the case here, the defendant is entitled to an evidentiary hearing on that question. This is the procedure which was followed by the majority of federal courts prior to McCarthy, see 394 U. S. at 468-69, and which therefore continues to be applicable to guilty pleas accepted prior to the date of the McCarthy decision.

II.

In our opening brief, we urged that this Court, in the exercise of its supervisory power over the District of Columbia courts, should apply the McCarthy rule retroactively, notwithstanding Halliday. In support of this argument, we pointed out that a long-standing Resolution of the District Judges, which was in effect when the guilty pleas in this case were entered, required that

the trial judge make the following determinations (among others) before accepting a plea of guilty:

> "3. That defendant understands the nature of the charges against him which should be stated to him in brief by the Court notwithstanding a prior reading of the indictment.
>
> "4. That defendant did in fact commit the particular acts which constitute the elements of the crime or crimes charged."

Since this rule was in effect even before McCarthy, we urged that retroactive application of McCarthy in this jurisdiction would not unduly disrupt the administration of justice in the District of Columbia.

The Government argues, however, that "reliance on the pre-McCarthy procedures by the judges of the District Court was well-nigh universal," and that this Court gave "its apparent approval to those procedures as recently as five years ago." In support of this contention, the Government cites Everett v. United States, 119 U.S.App.D.C. 60, 61-62 n.3, 336 F.2d 979, 980-81 n.3 (1964). In that case, however, this Court found that:

> "Before accepting these guilty pleas, the District Judge, pursuant to Fed.R.Crim.P. 11 and Resolution of the Judges of the U.S. District Court for the District of Columbia promulgated June 24, 1959 thereunder, conducted an extensive interrogation of appellant as to the facts of the alleged crimes and his reasons for pleading guilty thereto." Ibid. [Emphasis added.]

The defendant's responses to the trial court's interrogation in Everett were not conclusory or general. He related in detail facts constituting the elements of the crime, explaining that he had entered a liquor store, brandished a gun, and demanded money, 119 U.S.App.D.C. at 62, 336 F.2d at 981. There was no such explicit factual statement by the defendant here.

The "extensive interrogation" by the trial judge of the defendant in Everett is, of course, precisely what both Rule 11 and the Resolution referred to above required. What the defendant here is complaining about is that the District Judge failed to conduct just this sort of interrogation in this case.

The Everett case, in short, supports the defendant's position, not the Government's. It demonstrates that the procedure followed in this case was not "well-nigh universal" as the Government contends but, on the contrary, that the judges in this jurisdiction have customarily followed precisely the procedures which the defendant claims should have been followed here.

III.

Finally, the Government argues that defendant "has made no allegation or colorable claim that he did not in fact understand the nature of the charges against him," and that, "if he has such a claim" it should be presented "by an appropriate motion to the District Court in the first instance."

This argument implies that the burden is on the defendant to prove that he did not understand the charge, rather than on the Government to prove that he did. As we pointed out in our opening brief, however, it was well-established even before McCarthy that where a guilty plea has been accepted without compliance with Rule 11 the burden falls on the Government to show that the plea was knowingly made. See Rimanich v. United States, 357 F. 2d 537, 538 (5th Cir. 1966) and cases cited therein. This much was conceded by the Government itself in its brief in McCarthy:

> "The initial burden of showing an inadequate Rule 11 inquiry rests upon the defendant. Once absence of a proper inquiry is established, the burden shifts to the government to show that, realistically, no fundamental error resulted from the trial judge's failure to comply literally with the rule." Brief for United States, McCarthy v. United States, U.S. Supreme Court, October Term, 1968, No. 43, p. 30 (emphasis added).

Nor is there any merit in the Government's suggestion that the defendant must first challenge the validity of the proceedings below by a motion filed in the District Court. Although cases of this sort usually arise by means of a post-conviction motion, a direct appeal is also available. McCarthy itself, for example, involved a direct appeal, and the Government conceded in that case that "should the Court not accept our view that the record affirmatively shows that petitioner's plea was knowingly and voluntarily entered, the appropriate disposition would be to remand for a hearing in the district court on that issue." (Brief for United States, supra, at p. 23.) See also Boykin v. Alabama, 395 U.S. 238 (1969).

## CONCLUSION

For the reasons stated above and in our principal brief, the judgments in these cases should be vacated and the cases remanded with instructions to permit the defendant to plead anew to the indictments. In the alternative, if the Court is unwilling to set aside the guilty pleas on this record, the cases should be remanded with instructions to the District Court to vacate the

judgments unless the Government can prove, at a hearing before another judge, that defendant fully understood the charges against him at the time he entered his guilty pleas.

Respectfully submitted,

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